United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 31, 2003

TO: Richard L. Ahearn, Regional Director
Catherine M. Roth, Regional Attorney
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pacific Maritime Association/ILWU
Case 36-CA-9244 et al.

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This case was submitted for advice as to whether the Union and Employer violated Section 8(b)(1)(A) and (2) and Section 8(a)(1) and (3), respectively, by entering into and implementing an affirmative action plan that reserves hiring spots for minority applicants and grants successful minority applicants credit hours enhancing their ability to advance to the next higher classification of employee. We conclude that absent withdrawal, the Region should dismiss these charges. First, the Union's race-based agreement did not breach its duty of fair representation as an invidious race-based distinction because, applying the principles of United Steelworkers v. Weber,[1] the agreement was not clearly unlawful under Title VII. Second, as a result of the dismissal of the duty of fair representation charge, we would also dismiss, absent withdrawal, the charge alleging that the Employer's entrance into and implementation of the affirmative action plan independently violated Section 8(a)(1) and (3).

FACTS

1. *Bargaining Relationship and Operation of Hiring Halls*

The International Longshoremen Workers International Union Local 8 (Union) is the exclusive bargaining representative for a single unit consisting of all longshoremen and marine clerks employed in ports on the Pacific Coast by employer members of the Pacific Maritime Association (Employer). The members of this bargaining unit work under a single coastwide collective-bargaining agreement known as the Pacific Coast Longshore and Clerks

[1] 443 U.S. 193 (1979).

Agreement (PCLCA). The PCLCA includes another document, the Pacific Coast Longshore Contract Document (PCLCD), which governs the terms and conditions of employment for longshoremen employed by PMA member companies. The PCLCD provides for the joint maintenance and operation by the Union and Employer of longshore dispatching halls in each port covered by the agreement, including the Port of Portland. Longshoremen and clerks are dispatched from these halls to available jobs.

Under Section 8.3 of the PCLCD, preferences in dispatch are given to longshoremen in the following order: registered, or Class A longshoremen; permit, or Class B longshoremen; and unregistered, or "casual" longshoremen. If casual longshoremen make themselves available for dispatch to a job by "plugging the board" with their permanent number, they must accept the job or wait until their number is reached again. Registered and permit longshoremen are entitled to fringe benefits established by the PCLCD and to guaranteed pay for certain times when work is not available. Casuals do not receive these benefits and must be present at the hiring hall to obtain a job at dispatch time.

Casuals with the most hours worked are selected for advancement to the permit "B" ranks. Class B registrants then generally advance to Class A status in no more than five years.

The PCLCD establishes various committees having equal numbers of Employer and Union representatives. The Joint Coast Labor Relations Committee (JCLRC), located in San Francisco, California, primarily handles matters affecting all ports, and matters referred by the local port committees when they cannot reach agreements. Beneath the JCLRC, at each port, is a Joint Port Labor Relations Committee (JPLRC), which controls the dispatching of longshoremen through hiring halls and maintains longshore registration lists.

2. *Past Discrimination Claims at the Portland Port*

In 1994, several EEOC charges were filed against the PMA and ILWU alleging unlawful race discrimination against African-Americans with respect to Class "B" registration. The EEOC dismissed the charges. One of the charging parties in that litigation and another African-American casual longshoreman filed lawsuits, which were eventually dismissed on summary judgment. One of these lawsuits, Black v. PMA and ILWU, is still pending on appeal.

3. *Employer and Union Efforts to Increase Minority Casual Employment: 1999 and 2000*

In 1999 and 2000, the Employer increased the number of casual longshoremen. As part of this process, the state Oregon Employment Department solicited applicants by distributing "interest cards" at three locations in Portland. To ensure that minorities were adequately represented in the casual draw, two of these locations were in Portland's minority communities. Despite these efforts, the 1999 casual hiring program still yielded a conspicuous under-representation of minorities as follows:

		Percent
American Indian/Alaska Native	7	4.9%
Asian/Pacific Islander	0	0.0%
Black	2	1.4%
Caucasian	133	92.4%
Hispanic	2	1.4%
TOTAL	144	

4. *Subsequent efforts to increase minority casual employment*

In 2001, the JCLRC failed to agree on a method for adding minorities to the casual ranks. The JCLRC submitted the issue to an arbitrator, who directed the JCLRC to select an expert to determine the appropriate distribution of casuals in the Employer's workforce in terms of ethnic origin (black, white, Asian, Hispanic), based on the racial makeup of the population in the Portland Area. Pursuant to the arbitration decision, the JCLRC hired The Champion Services Group, Inc. (Champion) to determine whether it was appropriate to establish minority hiring goals.

The Champion report showed under-utilization in both the 2001 actual workforce and the 2002 projected workforce for Blacks, Hispanics, and Asians, and over-utilization for Native Americans, based on a breakdown of the racial composition of the workforce and the local population. Champion found that the overall minority population in Portland in 2001 was 14.2%, and that the minority composition of the Employer's overall workforce in 2001 was 9.7%, with a projection of 8.4% in 2002. The casual workforce had a 2001 minority composition of 7.9%, with a projection of 4.2% in 2002. The "A" and "B" workforces had a 2001 minority composition of 9.6% and 13.3%, with a 2002 projection of 10.1% and 10%, respectively. The Champion report concluded that minority representation was inadequate in the longshore workforce, and recommended that the JCLRC hire 26 new minority casual longshoremen "[t]o insure that

minority representation for Identified Casuals and subsequently, for Registered Longshore Worker classification, continues to increase over the upcoming years." The Champion report continued that "[a]lthough elevation in the ranks requires time in job, Champion also hopes that consideration will be given to finding a meaningful way to increase the minority representation in the Registered A and B job classification."

Based upon Champion's findings of under-utilization for the different racial categories, the report established "good faith" minority hiring goals for 2002, as follows:

Minority Group	Goal
Blacks	13
Hispanics	6
Asians	7
TOTAL	26

The JCLRC adopted the Champion report and continued discussions regarding the acquisition of new casuals in the Port of Portland.

5. *The 2003 Identified Casual Hiring Program and Affirmative Action Plan for Portland*

On January 15-16, 2003, the JCLRC agreed to add 52 casuals using an affirmative action plan (AA Plan). Under the AA Plan, candidates were selected through a lottery process, which included the use of a "general drum" from which 26 candidates of any race were drawn. In addition, there were three separate drums containing one of the race classifications of Black, Hispanic, or Asian/Pacific Islander, from which 13, 6, and 7 applicants were drawn, respectively. All candidates drawn from the drums must comply with all applicable tests and requirements to be hired as a casual.

The Portland JPLRC was then directed to credit the 26 affirmative action hires the average number of hours worked by the existing casual workforce for the period December 7, 1991 through the fourth quarter of 2002. The granting of credit hours does not enhance the new minority casuals' wages, benefits, or ability to obtain referrals to jobs, but rather their ability to advance to the "B" list. The Employer and Union assert that they agreed to grant credit hours to the 26 minorities to address the racial imbalance within the workforce and to remedy insufficient minority representation in the 1999-2000 additions to the casual list.

The Employer has preliminarily calculated that, based on the total number of casual hours worked between December 7, 1991, and December 20, 2002, and the number of casuals employed, the average number of credit hours each of the 26 new minority casuals will receive for use in any future registration is 711.10 hours. According to the Employer and Union, however, this figure has not been finalized and is subject to JCLRC approval.

The implementation of the AA Plan is not only the subject of the instant charges, but also of charges filed with the state agency responsible for alleged racial and ethnic employment discrimination. As described more fully near the end of this memorandum, that state agency has preliminarily determined that the charges lack merit.

ACTION

We conclude that the Region should dismiss, absent withdrawal, these Section 8(b)(1)(A) and (2) and Section 8(a)(1) and (3) charges. The Union's entrance into and implementation of the AA Plan did not breach its duty of fair representation as an invidious race-based distinction because it was not clearly unlawful under Title VII. To the contrary, a state agency having primary jurisdiction over and expertise in the resolution of employment discrimination claims has determined that both aspects of the plan are not discriminatory under Title VII or state employment discrimination laws. As a result of the dismissal of the duty of fair representation charge, we would also dismiss, absent withdrawal, the charge alleging that the Employer's entrance into and implementation of the AA Plan violated Section 8(a)(1) and (3) because it is dependent on a breach of the Union's duty of fair representation.

1. *Section 8(b)(1)(A) Duty of Fair Representation*

a. *Legal Background*

An exclusive collective-bargaining representative is endowed with a wide range of reasonableness in the performance of its duties, "subject always to complete good faith and honesty of purpose in the exercise of its discretion."[2] Thus, a union may balance the rights of

[2] See Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (no breach of duty of fair representation by union agreement to contract clause that granted enhanced seniority to one group of employees, thus causing layoffs in another group of employees); Airline Pilots Assoc. v. O'Neill, 499 U.S. 65 (1991) (breach of duty of fair

individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group if its conduct is based on permissible considerations.[3] If union conduct resolves differences between groups in a rational, honest, and nonarbitrary manner, such actions may be lawful under Section 8(b)(1)(A) even if some employees are adversely affected by a union decision.[4] However, a union is obligated to represent unit employees fairly, in good faith and without discrimination or conduct based on arbitrary, irrelevant or invidious distinctions.[5]

A union breaches its duty of fair representation when it causes an employee's employment status to be adversely affected on the basis of an invidious factor such as race.[6] For example, a union may not depart from established exclusive hiring hall procedures and cause a denial of employment to an applicant based on race.[7] However, the Board will allow out-of-turn referrals of minority and female candidates where the union presents documentary or testimonial evidence that the referrals were minority requests under a Title VII consent decree that has been incorporated into a collective bargaining agreement.[8] A

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representation only where a union's conduct is so far outside a wide range of reasonableness "as to be irrational").

[3] See Ford Motor Co. v. Huffman, 345 U.S. at 338.

[4] See Humphrey v. Moore, 375 U.S. 335, 348-49 (1964) (no breach of duty of fair representation where union resolved seniority dispute in favor of one group of employees over another); see also Airline Pilots Assoc. v. O'Neill, above.

[5] Vaca v. Sipes, 386 U.S. 171, 177 (1967).

[6] See Local 12, United Rubber, Cork, and Linoleum (Business League of Gadsden), 150 NLRB 312, 314 (1964), enfd. 368 F.2d 12 (5th Cir. 1966), cert. denied 389 U.S. 837 (1967).

[7] See id., at 320.

[8] Ironworkers Local 373 (Building Contractors), 232 NLRB 504, 505, 512 (1977); 235 NLRB 232 (1978), enfd. mem 586 F.2d 835, 108 LRRM 2279 (3d Cir. 1978) (union violated Section 8(b) where members preferentially referred did not fall within excepted categories in a Title VII consent decree issued by a district court and incorporated into the parties' collective bargaining agreement); see also Ironworkers Local 483 (Building Contractors), 285 NLRB 123,

union also does not breach its duty of fair representation when it refers out-of-order female and minority hiring hall registrants at the request of contractors engaging in good faith efforts to meet affirmative action hiring goals for federal contracts under Executive Order 11246.[9] Here, although the Union did not act pursuant to a consent decree or federal minority hiring goals, it asserts that it lawfully entered into and implemented the AA Plan under Weber.

b. *Voluntary Affirmative Action Plans under Title VII and United Steelworkers v. Weber*

In United Steelworkers v. Weber,[10] the employer and union collectively bargained an affirmative action plan that reserved for black employees 50 percent of the openings in an in-plant craft training program until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labor force. Trainees in the program were accepted by seniority. The most senior black employee selected into the program had less seniority than several white employees whose bids for admission were rejected. A white employee then sued, alleging that because the affirmative action program had resulted in junior black employees receiving training in preference to senior white employees, he and other similarly situated white employees had been discriminated against based on race in violation of Title VII. The Supreme Court disagreed with such a mechanistic approach, and concluded that the statute "cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination" of racial discrimination. 443 U.S. at 204. The Court established parameters to assess the lawfulness of voluntary affirmative action plans: (1) their purpose must mirror the purpose of Title VII to remedy

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135 (1987), on remand from 672 F.2d 1159 (3d Cir. 1982), enf. denied in relevant part, 854 F.2d 1113 (3d Cir. 1989).

[9] See Operating Engineers Local 302, Case 19-CB-6948, Advice Memorandum dated July 1, 1992 (out-of-order referrals of female and minority members pursuant to federal contractor EEO hiring goals lawful as serving "legitimate union interests" and as "necessary to the effective performance of the union's representative function;" under the parties' collective bargaining agreement, the employer could obtain females and minorities from outside the hiring hall if the union could not fill the employer's requisition for employees).

[10] 443 U.S. 193 (1979).

a manifest imbalance in the workforce; (2) they cannot unnecessarily trammel the rights of non-minority employees; and (3) the plan is a temporary measure not to maintain racial balance, but only to eliminate a manifest racial imbalance. 443 U.S. at 208-209. The Court then concluded that the plan at issue fell within these parameters.

c. *The Instant Case*

We conclude that the Union did not invidiously exceed its wide range of reasonableness by entering into and implementing the AA Plan because there is no evidence that the Union sought to do anything other than "resolve differences between" minorities and non-minorities in a "rational, honest, and non-arbitrary manner." The AA Plan is not clearly or facially deficient under Weber with respect to either the reservation of 26 spots for minority applicants or the granting of credit hours to successful minority applicants.

(i) *Reservation of 26 Spots for Minority Applicants*

Under the first Weber prong, the reservation of spots for minority applicants appears lawful because of the imbalance of minorities in the casual workforce. Only 7.9% of the casual workforce is comprised of minorities, the majority of which are Native Americans who are not among the affirmative action hires. The local population has a minority composition of 14.2%. Thus, the Union could reasonably conclude that there is a manifest imbalance in the casual workforce under Title VII.

Under the second Weber prong, the Union could reasonably conclude that the reservation of 26 spots for minority applicants does not "unnecessarily trammel" the rights of non-minority applicants. All applicants regardless of race are eligible for selection as casual employees from the "general drum" of all applicants. This aspect of the AA Plan is similar to the reservation for blacks of half the spots in the craft training program at issue in Weber.

Under the third prong of Weber, the AA Plan's reservation of 26 spots for minority applicants is a temporary measure designed to remedy a racial imbalance, not to maintain a racial balance. The plan is a one-time lottery to attain a racially balanced workforce.

(ii) *Granting of Credit Hours to Successful Minority Applicants*

The Union also could reasonably conclude that the granting of credit hours to successful minority applicants is not unlawful. Under the first prong of Weber, the Employer and Union seek to grant credit hours to hasten the movement of minorities to the permit "B" and registered "A" workforces. There is a current imbalance - albeit arguably less "manifest" than in the casual workforce - between the minority compositions of the Class "A" and "B" workforces and the local population. Moreover, the imbalance in the "A" and "B" workforces will likely increase without a means of advancing minorities through the casual list, because the addition of 144 casuals in 1999 and 2000 consisted of virtually no minorities and resulted in a disproportionate number of non-minorities in the casual ranks. Thus, virtually no minorities have a near-term opportunity to advance to the "B" list without assistance such as the credit hours. As a result of the existence of some current imbalance in the "A" and "B" workforces, and the likelihood of a greater imbalance when the Employer and Union agree to advance casuals, we would not conclude that the granting of credit hours fails to comply with the first Weber prong.

Second, granting of credit hours does not "unnecessarily trammel" the rights of non-minority casuals because the new minority casuals will not necessarily be hired in any future Class B registration. A casual's advancement to the "B" list depends on a number of factors, most notably how often a casual "plugs the board" and works. Although gaining credit hours enhances the minorities' ability to advance to the "B" list, the additional hours do not ensure advancement. The plan in Weber passed muster even though it specifically ensured that 50% of the openings in the company's craft training program were reserved for blacks regardless of seniority. *A fortiori*, the grant of credit hours here is not clearly unlawful.

Last, as with the reservation of spots for minority applicants, the granting of credit hours is a one-time temporary measure designed to eliminate the racial imbalance in the longshore workforce.

We find that the Union reasonably agreed to this AA plan, even though the EEOC and federal courts previously have dismissed charges by minority longshoremen against the Union and Employer alleging racial discrimination in advancing casuals to the "B" workforce. The lawfulness of an affirmative action plan under Weber does not turn on whether the parties are attempting to remedy a prima facie

case of employer discrimination.[11] In Johnson v. Santa Clara County,[12] the Court further explained that application of the "prima facie" standard in Title VII cases would be inconsistent with Weber's focus on statistical imbalance, and could inappropriately create a disincentive for employers to adopt an affirmative action plan. Thus, a comparison between an employer's workforce and the local population is more appropriate.[13] Here, we conclude that the Union acted within its wide range of reasonableness even if a minority longshore plaintiff in a Title VII case could not establish a prima facie case of actual Employer discrimination in advancing minorities to the "A" and "B" lists.

(iii) *A State Agency with Primary Jurisdiction over Employment Discrimination Claims has Dismissed Charges Alleging that the AA Plan is Unlawful under Weber*

Finally, we note that the Board does not have primary jurisdiction over employment discrimination disputes, including disputes over the legality of affirmative action plans under Weber, and the Charging Parties have relief available elsewhere. In fact, at least two charges have been filed with the Oregon State Bureau of Labor and Industries Civil Rights Division (BOLI) alleging that both the reservation of spots for minorities and the granting of credit hours to those minorities violates federal and state

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[11] See Weber, 443 U.S. at 208 n.8. (an employer's implementation of an affirmative action plan does not depend on whether the effort is motivated by fear of liability under Title VII).

[12] 480 U.S. 616 (1987).

[13] See id. at 616, 633 & n.10 (1987); see also Setser v. Novack Inv. Co., 657 F.2d 962, 968 (8th Cir. 1981), cert. denied 454 U.S. 1064 (1981) ("A showing of a conspicuous racial imbalance by statistics is sufficient, even if the statistics employed would not be sufficient to show a prima facie violation of Title VII."). The court continued that an employer's internal investigation and analysis of its workforce resulting in a conclusion of a racially imbalanced workforce would satisfy its burden to produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its workforce and is remedial. See id.

employment discrimination laws.[14] BOLI has informed the Region that these charges will be dismissed because the AA Plan provisions at issue are not discriminatory under Weber. We would not argue that the Union unlawfully agreed to a Title VII violation where that conclusion would be directly inconsistent with this decision by BOLI, an agency with primary responsibility in these matters.

2. Section 8(a)(1) and (3) Discrimination in Employment Charge against the Employer

We agree with the Region that the Section 8(a)(1) and (3) charges should be dismissed. First, there is no nexus between any alleged employer race discrimination and the exercise of Section 7 rights.[15] Second, because we find no merit to the Section 8(b)(1)(A) and (2) charges, we likewise would not allege a derivative Section 8(a)(1) and (3) violation based on the Employer's complicity in the alleged discriminatory actions.[16]

B.J.K.

[14] The BOLI charge alleging the unlawful granting of credit hours was filed by one of the Charging Parties in the instant cases.

[15] See Jubilee Manufacturing Co., 202 NLRB 272 (1973), enfd. 504 F.2d 271 (D.C. Cir. 1974); Vought Corp., 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986) (white employee communicated to several black employees that another white employee was rumored to be in line for promotion over a black employee, and suggested that the black employee take the matter up with management at the next meeting; warning for making those suggestions violated Section 8(a)(1)).

[16] Cf. General Cinema Corp., 214 NLRB 1074, 1082 (1974), enfd. in relevant part 526 F.2d 427 (5th Cir. 1976) (employer did not itself directly discriminate against applicants based on race, but by doing "business as usual" with the union, became a party to the union's continued discriminatory referrals.)